abundantly clear as a matter of general principle and in particular relation to this type of case it was accepted as so long ago as 1936 by Aitken J. in the case of *Saminathan* v. *Public Prosecutor*."

I therefore set aside the order of the learned magistrate discharging the respondents except in so far as it affects Mohamed bin Noordin and Chan Ah Kai, and order a re-trial before another magistrate since the magistrate who heard the case has left Ipoh on transfer. The appeal against the order of discharge in respect of the said Mohamed bin Noordin and Chan Ah Kai will no doubt be heard in due course when the notice of hearing is served on them.

Order accordingly.

SWAMY v. MATTHEWS & ANOR.

[O.C.J. (Ismail Khan J.) October 8, 1966]

[Seremban — Civil Suit No. 44 of 1957]

Negligence — Medical practitioner — Standard of care.

In this case the plaintiff claimed damages for negligence on the part of the first defendant, a medical officer employed by the second defendant, in treating the plaintiff for an itch on his hands by injecting an arsenical preparation, acetylarsan, which was alleged to have resulted in paralysis of his hands and legs. The medical evidence showed that it was not certain that the injections caused the paralysis.

Held: the plaintiff had not discharged the onus of showing that the injection of acetylarsan was the cause of the paralysis and further there was no evidence to show that the first defendant had been negligent in prescribing the injection.

Cases referred to:—

(1) *Bolam* v. *Friern Hospital Management Committee* [1957] 1 W.L.R. 582.

(2) *Roe* v. *Minister of Health* [1954] 2 W.L.R. 915.

(3) *Hancke* v. *Hooper* (1835), 7 C. & P. 82.

CIVIL SUIT.

Dato' S. P. Seenivasagam for the plaintiff.

N. A. Marjoribanks for the first defendant.

Wong Seng Chow for 2nd defendant.

Cur. Adv. Vult.

Ismail Khan J.: The plaintiff was until his disablement an estate conductor who was employed at the relevant time by the second defendant. The first defendant is a medical practitioner engaged by the second defendant, as visiting medical officer, to look after the health of the company's employees. The plaintiff claims damages for negligence on the part of the first defendant in treating the plaintiff for an itch on his hands by injecting a drug which was alleged to have resulted in paralysis of the hands and legs, while the company is said to be responsible for the tort of its agent on the ground of *respondeat superior*.

The facts as found by me or admitted are as follows. On 31st July, 1956, the doctor prescribed an injection of acetylarsan, an arsenical preparation, which I find to have been administered without any other reaction in the plaintiff than a trivial rise in temperature. Although this injection was strenuously denied by the plaintiff, I accept the defence on this point, borne out as it is by my own examination of the relevant entry in D3 which I am fully satisfied was genuine and made at the time the treatment was given.

On 21st September, 1956, another entry was made by the doctor in D3 to this effect:—

"Samy. Early pneumonia. Keep in touch with me if temperature flares."

On this occasion the plaintiff went to the hospital at Seremban for three days. In the statement of claim it was alleged that after an injection of acetylarsan the plaintiff's "face as well as his body was swollen accompanied by a rise in temperature," and it was this very condition that led to his being sent to hospital. My finding on this point, however, is that he did receive an injection of an adult dose, that subsequently he had a rise in temperature, but there was no swelling of the face or body as alleged. The doctor's diagnosis of pneumonia was borne out not only by the entry I have just referred to, but also by the evidence of the plaintiff's own witness Lopez. There is no evidence to support the plaintiff's own allegation of the swelling.

The next or third occasion when the plaintiff was given an injection was on 23rd November, 1956. Four days later, the doctor ordered that he be sent to the Seremban hospital. To the medical officer on duty he sent a letter by the patient requesting a "full investigation *re* general debility, chronic nocturnal cough and dermatitis," and adding a note that the patient was "sensitive to arsenical drugs." As to the sensitivity, I accept the doctor's explanation which seems to me wholly reasonable. The plaintiff stayed in hospital from 3rd December, 1956 to 30th January, 1957. His illness was diagnosed as "polyneuritis (?) arsenical" — see D9. This ailment resulted in paralysis of the plaintiff's arms and legs and his services were dispensed with by his employers, the second defendant, who on 5th February, 1957 (see P2) offered him one month's pay in lieu of notice. By his reply dated 13th February, 1957 (see D4) the plaintiff rejected the notice and claimed to be entitled to continue on the company's payroll and to occupy free quarters until his recovery on the ground that his disability was brought about by the treatment he had been given for his skin disease. On 31st July, 1957, the plaintiff commenced this action.

In the particulars of negligence alleged against the first defendant, it was stated (a)

that this defendant repeated the acetylarsan injection well knowing of the plaintiff's allergy to arsenic; (b) that he did so in spite of protests by both the plaintiff and the dresser Lopez; (c) that despite the reactions from the September injection this defendant "did not care to examine the plaintiff before repeating the same injection"; and (d) that this defendant had neglected to refer to records of the diagnosis and treatment of the plaintiff in the Seremban hospital in September.

In his defence, the first defendant denied that the plaintiff's condition was related in any way to the administration of acetylarsan or that he, the defendant, was in any way negligent. In particular, he traversed the allegations that the plaintiff was allergic to arsenic, that the second injection was given in spite of protests by the plaintiff as well as Lopez, and that there was no examination of the plaintiff before the administration of the second injection.

The second defendant by his counsel admitted in the course of the trial that the company were the employers of the first defendant; so the question of its liability must depend upon the decision as to whether or not the first defendant was guilty of any negligence.

Two questions arise for determination of liability, namely: Was polyneuritis caused by the injection or injections of acetylarsan? If so, was the first defendant negligent in prescribing such treatment? Both questions are of great difficulty. They have given me no little anxiety, but each requires an answer which I shall try to make as best as I can in the state of the evidence available.

As to the first question, it is true that polyneuritis developed within a few days after the relevant injection. But was the one so related to the other as to be unmistakably in the nature of cause and effect? Is the mere coincidence in point of time sufficient to establish that the acetylarsan, and the acetylarsan alone, could have caused the polyneuritis? By itself, and without any other relevant evidence to the contrary, it should be rightly said that the onus on the plaintiff has been satisfactorily discharged by proof of the injection and the disablement that followed. However, in this case, there are a number of material facts that must, in my opinion, be taken into account.

In the first place, I have accepted the evidence of the first defendant that he gave the plaintiff an injection of 5 c.c. of acetylarsan on 31st July, 1956. Such reaction as there was, was a mild one to be expected normally. The second injection on 21st September, 1956, was accompanied by a slight temperature but nothing more untoward, such as the alleged swelling for instance. Lopez observed only the temperature and flushing of the face. The X-ray examination made in hospital on this occasion bears out what the defendant said as to the reason for the plaintiff being sent to hospital. When the third injection was prescribed on 23rd November, 1956, Lopez did not hear any complaint by the plaintiff about his reaction to the preceding injection. Hence, there was no protest either by the plaintiff or by Lopez against the repetition of the acetylarsan as alleged in the statement of claim. The half dose prescribed was a normal precaution. It was not a reduction by reason of such protest or any warning of allergy attributed to Lopez but denied by the latter. I feel I cannot entirely brush aside the fact that the two previous injections of 5 c.c. each did not produce any symptoms of polyneuritis, whereas the third dosage to which polyneuritis is attributed was the reduced one normally given to a child which would be comparatively much less effective. It seems to me strange that if two potent doses did not cause polyneuritis, a mild one on the third occasion should have had that effect. Accordingly, it seems to me more logical and reasonable to hold that the itching sensation which the plaintiff felt shortly after he took up employment with the second defendant might be symptoms of an impending ailment which was already latent but dormant in the plaintiff's system rather than a superficial skin disease brought about by improper diet.

Bearing the above possibility in mind, I have in the next place set myself the task of studying and analysing the medical evidence with very great care. Dr. Khaira was personally in attendance on the plaintiff while he was in hospital, and from reading the whole of his evidence I have come to the conclusion that he was not prepared to pinpoint the cause of the plaintiff's polyneuritis. He said on the one hand that it was "entirely rare to get polyneuritis from an arsenical injection" and "extremely rare for polyneuritis to be caused by an injection of acetylarsan": on the other hand that "polyneuritis can be due to many causes; one can have polyneuritis without an allergy". He went on to say that in his diagnosis he had some doubt whether polyneuritis was due to arsenic. He therefore went into the plaintiff's history and was told by the plaintiff that he had been supervising the spraying of a weed-killer. "If the plaintiff said he was not in contact with arsenic spraying since 1951, that would contradict what he gave me to understand. An important factor in diagnosis is the patient's history. If the patient does not co-operate or gives an inaccurate history it makes diagnosis difficult and leads to wrong diagnosis." Hence, Dr. Khaira's diagnosis was undoubtedly influenced by the plaintiff wrongly reporting his contact with arsenic predisposing him to sentitivity, yet there was "nothing to suggest trouble due to an allergy,"

and "nothing in the records to suggest it."

The next medical witness called by the plaintiff was Dr. Aalders who examined the plaintiff on 18th March, 1958. "The patient had polyneuritis," he said, but "I am not prepared to say what the cause of it was." He had however formed certain opinions from what he had been told by the plaintiff who related to him the symptoms through an interpreter, presumably a lawyer's clerk. The doctor admitted that the symptoms described could have been taken from a book shown to him, and since the examination took place more than seven months after the commencement of this action, I think that his diagnosis of the cause must be accepted with some reserve since it necessarily depended on the truth of the patient's history as told to him. Evidence could have been given that it was not a lawyer's clerk who attended to the plaintiff or Dr. Aalders.

The third independent medical witness was Professor Ransome who knew of "no case of anyone suffering from polyneuritis due to injection or oral administration . . .. In the case of acetylarsan reaction, if any, is very mild." Later, he went on "It is possible that polyneuritis has nothing to do with acetylarsan. One cannot say the exact cause of it."

In view of the evidence of the three medical witnesses, not to mention the fact that two earlier injections failed to bring about polyneuritis, I have come to the conclusion that the plaintiff has not discharged the onus, even on a balance of probabilities, that the injection of acetylarsan was the cause of his polyneuritis.

Even if I am wrong, it is still incumbent on the plaintiff to show that the first defendant was negligent in prescribing acetylarsan. It cannot be denied that the defendant had long and considerable experience in the use of acetylarsan. It is a drug produced by manufacturers of the highest repute — *May* and *Baker* — which they still put on the market. Dr. Khaira had heard of acetylarsan, and while he admitted to only limited experience of the drug, he agreed that the effects of acetylarsan are mild. Later he said "I agree it is extremely rare for polyneuritis to be caused by an injection of acetylarsan. If a person says he is allergic then I would give him a small dose to see if he is. If he does not say he is allegic, then he is given the first injection and if he finds any ill-effects he will be tested for allergy with a second very small dose." Again, this was his view: "If the plaintiff came with a complaint of skin disease there is nothing wrong in giving an injection of acetylarsan." Moreover, there was nothing in the records of the plaintiff's visits to hospital to suggest that he had an allergy.

Dr. Aalders too did not find anything wrong in the use of arsenical injections. "From study I think it is usual to give a first dose and then a lesser dose to see if he can carry on with the treatment."

Professor Ransome also said "If one has reasonable experience of skin diseases one can prescribe acetylarsan which is considered most harmless in both toxic and allergic sense . . .. From what I have seen of plaintiff's hands, and when he says it is itchy, I say it is scaly dermatitis and it is one of the things for which arsenic could be prescribed . . .. For scaly dermatitis such as the plaintiff is suffering from, one would use acetylarsan for treatment even if one does not know the cause."

Having found no strictures in the medical evidence on the first defendant's use of the drug, I need only conclude by referring briefly to the allegations in the particulars of negligence. I find that there was no proof of allergy or that the first defendant knew of it; rather the contrary. I further find that there were no protests by the plaintiff or Lopez as alleged. I find that the absence of any untoward reactions to the first and second injections of a full dose did not impose on the first defendant any duty to take extraordinary care before repeating a third and smaller dose — in fact, the reduction in the third dosage was evidence of caution. Lastly, such records as there were of the hospital treatment would have proved of no assistance even if they were referred to.

Having thus decided in the first defendant's favour on both questions of fact, I shall refer briefly to the law on medical evidence. In *Bolam* v. *Friern Hospital Management Committee*,[1] at page 586, the test of negligence was stated by McNair J. in these words:—

> "In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

I would also refer to what Denning L.J. (as he then was) said in *Roe* v. *Minister of Health*,[2] at page 926:—

"But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure."

Finally, the following words of Tindal C.J. in *Hancke* v. *Hooper*,[3] seem to me most appropriate to the present case though uttered 130 years ago:—

"A surgeon does not become an actual insurer; he is only bound to display sufficient skill and knowledge of his profession. If from some accident, or some variation in the frame of a particular individuals, an injury happens, it is not a fault in the medical man . . . The plaintiff must shew that the injury was attributable to want of skill; you are not to infer it."

The action is dismissed with costs.

Claim dismissed.

Solicitors: *H. W. Tan & George; Lovelace & Hastings; Shearn, Delamore & Co.*

BAN HUAT SENG CO. LTD. v. LEE POH SOO

[O.C.J. (Ismail Khan J.) October 8, 1966]

[Seremban — Civil Suit No. 84 of 1958]

Practice and Procedure — Judgment in default of appearance — Application to set aside — Whether there was sufficient affidavit of service — Laches — Bona fides — R.S.C., 1957, O. 9, rr. 2 and 15, O. 13, r. 2, O. 67, r. 9.

The plaintiffs had obtained judgment in default of appearance against the defendant on April 30, 1959. On January 11, 1966, the defendant applied to have the judgment set aside on the ground that there was no affidavit of service as required by O. 13, r. 2 and on the ground that he had a good defence on the merits.

Held: there was in fact an affidavit of service in this case and the court could not in this case exercise its discretion in favour of the defendant as he had been guilty of *laches* and his conduct was not *bona fide*.

Cases referred to:—

(1) *Hamp-Adams* v. *Hall* [1911] 2 K.B. 942.

(2) *MacFoy* v. *United Africa Co. Ltd.* [1961] 3 All E.R. 1169.

(3) *Craig* v. *Kanseen* [1943] 1 All E.R. 108.

(4) *Evans* v. *Bartlam* [1937] A.C. 473.

(5) *Attwood* v. *Chichester* (1878), 3 Q.B. 722.

CIVIL SUIT.

Lee Boon Peng for the plaintiffs.

Edgar Joseph Jr. for the defendant.

Cur. Adv. Vult.

Ismail Khan J.: This is an application by way of summons-in-chambers to set aside a final judgment by the plaintiffs against the defendant in default of appearance and the execution issued thereon by way of bankruptcy notice. The application was adjourned to open court for argument.

On 14th December, 1958, the plaintiffs issued a writ for the sum of $19,585.04 being the balance of the defendant's account with the plaintiffs for sums advanced to the defendant towards the purchase of rubber. Appearance not having been entered, the plaintiffs entered judgment for the said sum and costs on 30th April, 1959.

On 11th January, 1966, the defendant took out a special summons to set aside the judgment on the following grounds:—

(1) that the plaintiffs had failed to file an affidavit of service in compliance with Order 13 rule 2 of the Rules of the Supreme Court; and

(2) that such failure nullifies all subsequent proceedings in default.

Before entering final judgment, the plaintiffs had sworn and filed the following affidavit:—

"I, Tay Leong Phuan of Malayan Chinese Hokkien nationality of full age of No. 14, Jalan Tunku Hassan, Seremban, make oath and say as follows:

1. I am the managing director of BAN HUAT SENG Co. Ltd., the abovenamed plaintiffs in this Suit.

2. That my solicitors Messrs. B. Kaher Singh & Karam have been informed by the Assistant Registrar, Supreme Court, Seremban that the writ of summons in this action was served on the defendant on 3.1.59 *vide* Assistant Registrar's letter No. (2) in Civil Suit 84-58 dated 7th January 1959 referred.

3. That I understand that an affidavit of service has already been filed by the process server of this Honourable Court in the above suit after the service of the writ on the defendant.

4. That the said defendant has not entered an appearance in this suit.

5. In view of the abovementioned paragraph 4 and the existing Order 13 rule 2 of the Supreme Court Rules 1957 which says that before judgment could be signed an affidavit of service should be filed and I now pray that this affidavit may be treated as an affidavit of service in this suit and further pray that judgment against the defendant may be given."

The defendant regarded this as the affidavit which the plaintiffs had filed for the purpose of entering judgment in default. He therefore attacked it on the following grounds:—

"(1) it does not mention where, how and by whom service was effected contrary to Rules of the Supreme Court, Order 67 rule 9;

(ii) it does not mention the day on which the indorsement of service was made contrary to Rules of the Supreme Court, Order 9 rule 15;

(iii) it shows that service was not effected personally by the deponent contrary to Rules of the Supreme Court, Order 9 rule 2;

(iv) it does not mention that at the time of the alleged service the writ and the copy thereof were subscribed and indorsed in the manner and form prescribed by the Rules of the Supreme Court;

(v) it does not mention the date of the writ."

The said rules read as follows:—